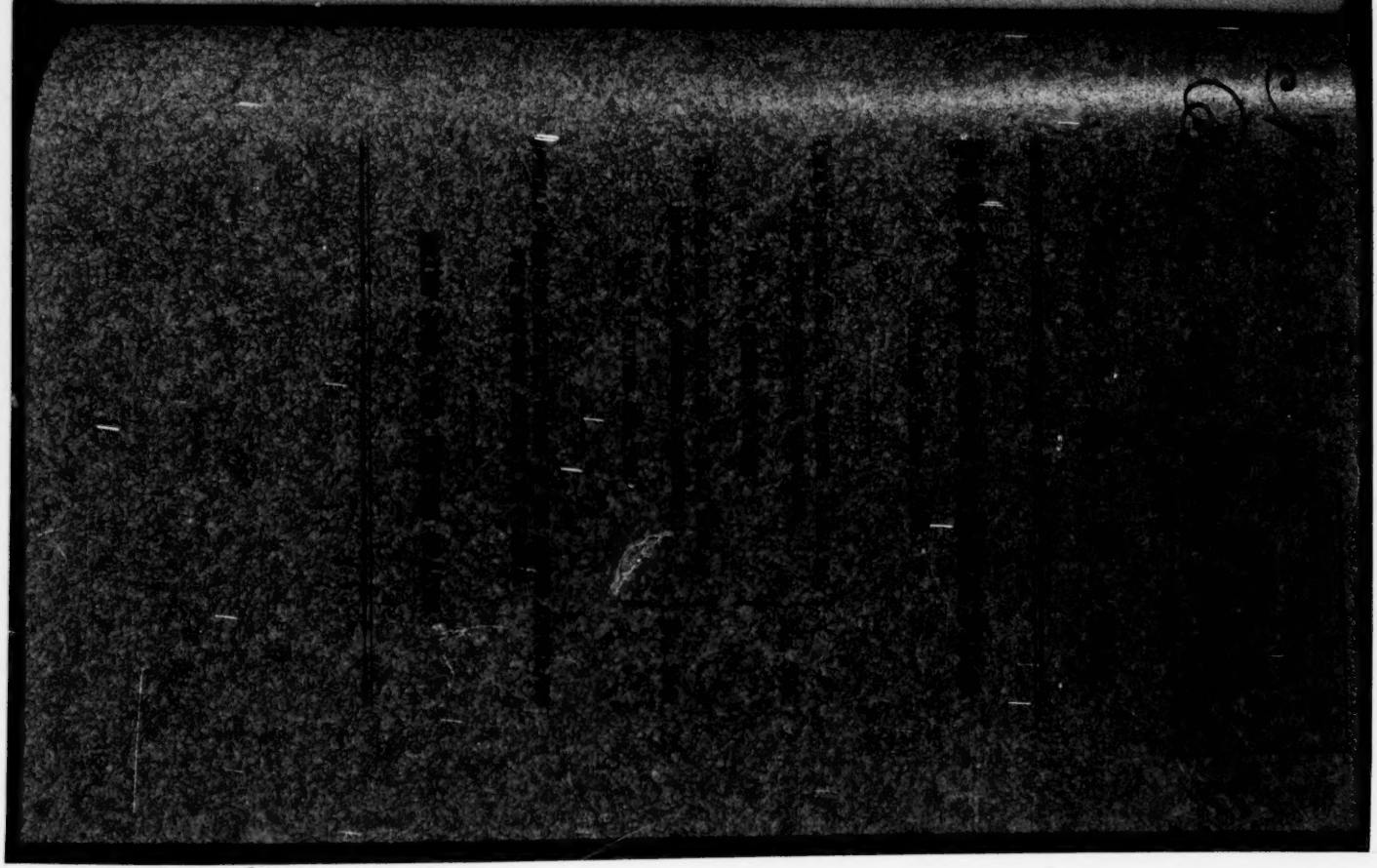

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK PAQUETE HABANA, Juan Pasos, claimant, appellant, *v.* THE UNITED STATES. — No. 395.

THE SPANISH SCHOONER LOLA, TOMAS Betancourt, claimant, appellant, *v.* THE UNITED STATES. — No. 396.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

FACTS.

The brief records in these cases show—

That the *Paquete Habana* was seized by the *Castine* on April 25, 1898, duly libeled, and after the deposition *in preparatorio* of the master was taken, was condemned with

her cargo as enemy property and for an attempt to violate the blockade of Havana. Afterwards, upon motion in behalf of the owners, the decree was vacated and a claim was filed by which it appeared that the vessel belonged to a resident of Havana, who, also, was the owner of one-third of the cargo, the other two-thirds thereof belonging to the claimant as master and the other members of the crew, all of whom were Cubans, who, "prior to the recognition of Cuban independence, were Spanish subjects." This appears also to have been the status of the vessel owner. It appears that the vessel was used exclusively in the coast waters of Cuba for catching small fish; that the seizure was made while they were returning to Havana with the catch from a fishing trip to Cape St. Antonio; that prior to that time they were unaware of the existence of the war or of the blockade; that the vessel had carried no cargo, save fish, and no passengers; that she was of sloop rig with one mast and 25 tons burden.

In the deposition of the master and claimant *in preparatorio* (pp. 9–11) it appeared that he was a Spanish subject, that the vessel sailed under the Spanish flag, and that she was a coasting vessel with a license to fish. The claim was that the vessel was under general law and under the proclamation of the President of April 26, 1898, privileged and exempt from capture and condemnation as a fishing vessel with her catch. Certain depositions of officers of the *Castine* and of the *Newport* appear in the case (pp. 17–20), but these affect only the question of distribution.

The vessel and cargo were sold for $490. After hearing upon the claim set up, the court affirmed and reinstated the previous decree of forfeiture, and thereupon the claimant took this appeal, assigning as error (p. 21) the refusal of the court to hold that fishing vessels in the situation of the *Paquete Habana* at the time of her capture are exempt from capture as prize; and that the vessels and cargoes were property of Cubans, whose freedom and independence had been recognized by Congress, and who were entitled accordingly to the rights, privileges, and immunities of neutrals. Objection was also made to the court's refusal to allow further proof on the grounds for the exemption claimed, but it seems that this is no longer urged.

That the *Lola* was seized on April 27, 1898, by the *Dolphin*; that the libel in prize was filed thereafter; that the deposition of the claimant on behalf of the owners (pp. 9–11) showed that he, a Spanish subject, living in Cuba, was the master appointed by the owner, who lives in Cuba and is a Spanish subject; that he was sailing under the Spanish flag; that the vessel is of about 55 tons burden and carried six mariners, who were all Spanish subjects; that the crew had no interest in the vessel, but had an interest of two-thirds in the cargo, the other third belonging to the vessel owner; that the cargo was live fish caught off the coast of Cuba; that the day before capture he was warned by the *Cincinnati* not to go into Havana, and changed his course for Bahia Honda, where he was told he would be allowed to land. After this evidence was taken the vessel was condemned with her cargo

as enemy's property, and then the decree was opened for the purpose of allowing a claim to be filed, although the claimant had previously appeared and made a claim on the ground that the vessel was a fishing vessel and not liable to capture. Thereupon a formal claim and test affidavit were filed showing the foregoing facts, stating in effect that both the owner and crew were Spanish subjects prior to the recognition of Cuban independence; that prior to their stoppage by the *Cincinnati* they were unaware of the existence of war and the blockade, and setting up similar statements in other respects and the same claim for exemption as in the *Paquete Habana* Case.

It appears that the vessel was of schooner rig, and had two masts.

After hearing upon this claim, the degree of condemnation was reinstated, and thereupon the property was sold for the sum of $800, and the claimant took this appeal, assigning the same grounds of error as in the *Paquete Habana* Case.

It seems that other cases are by agreement between counsel for the Government below and counsel for the claimants dependent upon the determination of the issue in these cases, said other cases being those of the *Fernandito*, of 35 tons burden; *Severito*, of 35 tons burden; *Santiago Apostol*, 78 tons; *Espana*, 80; *Poder de Dios*, 45; *Antonio Suarez*, 40; *Oriente*, 45; *Quatre de Setiembre*, 30; *Antonio y Paco*, 46; *Engracias*, 43. Most of these vessels carried a crew of eight, and others of six or seven, respectively. They all carried cargoes of fish.

THE LAW.

There are two questions in the case, viz: Whether as matter of general law fishing vessels of this class are exempt from seizure, and whether the owners, being Cubans, are entitled to the privileges and immunities of neutrals. That is, the questions regard the *character of the vessels* and the *character of the ownership.*

The claimants were, however, plainly Spanish subjects and bore the Spanish flag. It is not even suggested that they were in sympathy with the insurgents; much less that they were of that party. The principles as to neutrals would not apply in any case, for the insurgents were in fact belligerent allies, and this shows how impossible it is to regard these people taking provisions to Havana either in that character or as neutrals. And in law the insurgents were not recognized; the United States carefully avoided their recognition as belligerents, and the joint resolution of April 20, 1898, was merely a demand on Spain to relinquish sovereignty and a declaration that "the people of the island of Cuba are and of right ought to be free and independent," the truth being with the second rather than with the first half of this proposition.

The claimants were therefore clearly not of that section of the Cuban people who were to be regarded as belligerents with us and allies. What is the status in international law of the Cuban people generally, who, it is declared by the resolution of Congress on April 20, "are and of right ought to be free and independent?" There are few precedents to guide the inquiry. The

people of the North American colonies declared on July 4, 1776, that they were free and independent. Did they so stand in the law of nations until the contest was over and their status had been recognized and accepted? And may such a general declaration of Congress, one part of which certainly was not in strict accordance with the existing fact, terminate violently and abruptly the previous national ties of another people over whom we possessed no rights and exercised no control, especially as to that part of those people who did not desire the relations to Spain to be severed? Among such it is fair to presume and contend (in view of all the circumstances) that the claimants here are to be numbered. And can the argument be advanced as sound that such a general declaration has the force of law in the sense of drawing after it the consequence that the sovereign rights of the United States in the nature of monarchical *jura coronæ* and the vested rights of the naval captors are thereby repealed? We think not, and we respectfully submit that the character, *status*, and relations of these people are such that in international law, for all the purposes of the Spanish war, and, in particular, relative to the rights founded on the law of prize their previous governmental connection should be considered as undisturbed by the language or intent of the resolution of April 20, 1898. We further submit that the fullest light thrown on this inquiry, and the closest and most recent precedents furnished by adjudications of the court are those arising during the civil war, by which it was determined that the *status* of persons

domiciled in the South, not only of those disaffected toward the Federal authority, but of those who were neutral in the struggle, was that of citizens and adherents of the enemy, and such persons suffered various penalties in consequence.

In the case of *Mrs. Alexander's Cotton* (2 Wall., 404) Chief Justice Chase said (p. 419):

> It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore can not be regarded as enemy property; but this court can not inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until by the action of the Legislature and the Executive, or otherwise, that relation is thoroughly and permanently changed.

And in the *Prize Cases* (2 Bl., 635), it is said that—

> All persons residing within this territory [the Southern States] whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, * * * Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen (8 Cr., 384). The owner, *pro hac vice*, is an enemy." (3 Wash., C. C. R., 183.)

> The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded is legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory.

"In war, all residents of enemy country are enemies." (*Lamar, ex'r*, v. *Browne*, 92 U. S., 187, 194.) See also *Young* v. *United States* (97 U. S., 39, 60) to the same effect.

In *Ford* v. *Surget* (97 U. S., 594) the court states the following as one of the propositions settled by or plainly to be deduced from its former decisions:

> The district of country declared by the constituted authorities during the late civil war to be in insurrection against the Government of the United States was enemy territory, and all the people residing within such district were, according to public law and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, *without reference to their personal sentiments and dispositions.*

That political status and not individual loyalty or disloyalty is controlling on the question of enemy ownership is well settled by the cases of *The Amy Warwick* (Fed. Cas., No. 342); *The Hiawatha* (id., No. 6451); *The Peterhoff* (id., No. 11024); *The Sally Magee* (id., 12260).

The furthest concession made by the court from the doctrine that residence in the enemy territory makes an

enemy subject or citizen is shown by the following quotation from the syllabus in the *Peterhoff* case (5 Wall., 28):

> Citizens of the United States *faithful to the Union* who resided in the rebel States at any time during the civil war, but who during it *escaped from those States* and have subsequently resided in the loyal States or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.

Nor is anything to be found in the Executive proclamation of April 26, 1898, which specifically affects these vessels. The only language which may be considered at all applicable to them being the language of the second paragraph of the preamble, in which it is stated that it is desirable that the war "should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." This language, of course, refers particularly and perhaps exclusively to the more enlightened modern practice regarding the subjects of the articles which follow, viz, the provisions of the Declaration of Paris and the exemptions to certain Spanish merchant vessels entering or issuing from our ports.

Therefore the inquiry is as to the general rules of prize law regarding such fishing vessels. Webster defines a fishing "smack" as "a small vessel commonly rigged as a sloop, used chiefly in the coasting and fishing trade." But the exemption extended to fishing vessels in foreign prize practice, chiefly because of the insignificance of such property, or on account of humanitarian considerations, is understood to apply rather to

small open boats of the dory, dingey, or yawl class, for propelling which oars as well as sails are used, although a mast and sail are auxiliary and are employed to carry vessels to fishing grounds, where they are unstepped and furled.

It seems that even in deep-sea fishing, as for mackerel or herring off the Scottish coast, the boats are called skiffs ("herring skiffs"), although they are comparatively large and powerful boats and will stand a heavy sea. Nevertheless, even for this type of fishing in boats which go well offshore, they seem to be open and not decked, and to depend largely on their oars. (*Vide* Wm. Black's story of "The Four MacNicols," pp. 94, 95, 98, 110; Harper & Brothers: New York, 1882.)

These boats were sloops and schooners, and in the one case (*Paquete Habana*, record, p. 14) had been on a fishing expedition to Cape San Antonio, about 200 miles to the southwest of Havana, and in the other (*Lola*, record, p. 13) the boat had been to points near the coast of Yucatan, eight days distant. This is the type of boats engaged at fisheries, which, it is well known, as shown in other more recent fiction, proceed from England, France, Canada, and the United States to the fishing banks off Newfoundland, remaining there for months. Would it be contended that the sloops and schooners engaged in such fishing and the foreign rigged boats of similar type were the sort of fishing vessels exempt from seizure under the prize practice and usage of earlier times?

It is obvious that where two nations at war are contiguous, as in the case of England and France, the

presence of such small boats will be a frequent and customary fact in naval operations of the war, and the insignificance of the property and the special injustice to people in a small and hard way of living, and the equal inconvenience to both parties, would dictate the exemption of such boats and their cargoes of fish; and when the operations of the war were on more distant coasts and directed against a remote enemy, as in the operations during the Crimean war on the Russian Baltic coast, another reason would intervene, for it would not be worth while to carry such trifling prizes to a home port for adjudication. It is also understood that the rule of continental Europe is to regard the foregoing practice as tolerably well fixed into a rule of prize law; while, on the other hand, the English rule is to consider the question as discretionary with the executive and as requiring an express ordinance of exemption. Our own law has always followed the English determinations upon prize law, as in other branches of jurisprudence, rather than those of countries of continental Europe under the different system of the civil law. It therefore appears that to exempt fishing vessels of any class there should be some treaty obligation which requires it, or some specific ordinance or proclamation by which the executive shows an exercise of discretion in favor of the property claimed to be exempted. In this case no such title to exemption appears; on the contrary, the discretion lodged in the Executive has been exercised, and, we contend, under the circumstances, soundly exercised, by the commanders of the capturing vessels, against the contention of the claimants.

Furthermore, returning to the character of these vessels, they all appear of sufficient tonnage to take them out of the class of such small fishing vessels as ought to be and are exempted. They were sloop or schooner rigged. It is understood that many, if not all of them, were engaged in Spanish trade under the Spanish customs and navigation laws as Cuban coasting vessels and held a license to fish. That is to say, they were Spanish coasting vessels which pursued fishing as their avocation, under a license, when not engaged in the coasting trade. It is understood that it is common information in those waters and about our contiguous shores that this fact is ordinarily true of vessels of this character on the Cuban coast. We therefore contend that while it may have been true that fishing boats were regarded by prize law as too trivial for capture in old times when fisheries were carried on in small open boats, in more recent times, and since large vessels have been employed for that purpose, the reasons for the rule have disappeared, and in addition the rule itself was never fully accepted in England, but the subject was left to the discretion of the Crown.

In *The Young Jacob and Johanna* (1 Rob., 20), which was the case of a small Dutch fishing vessel taken April, 1798, Sir William Scott said:

> In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In

> the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade.

The French ordinance of the year 1543 gave the admiral a power of forming fishing truces with the enemy during hostilities, or of granting passports to individuals to continue their fishing trade unmolested. This practice prevailed so late as the time of Louis XIV. They have since fallen into disuse, "owing to the ill faith with which they were observed by the enemies of France." (Valin, liv. 5, tit. 1.) The indulgence was renewed again between the two countries in the war before the Napoleonic wars. Arret du Conseil du Roi, 6 November, 1780. (Note, p. 21, *The Young Jacob and Johanna*, *supra*.)

The Noydt Gedacht (2 Rob., p. 138, note) was the case of a small Dutch fishing vessel seized and condemned, with her cargo, as enemy property. *The Johan* (Edw., 275) was a Hamburg vessel which had sailed from that port on a fishing voyage, and was captured on her return. The vessel was restored on the ground that she had sailed from Hamburg before the issuance of the order of council prohibiting such a voyage. And in the case of the *Liesbet Van Den Toll* (5 Rob., 283) the vessel, which was occupied in the fishing trade of Holland, was restored for reasons affecting the national character of the owner.

THE BASIS OF THE LAW OF NATIONS AS AFFECTING THIS QUESTION.

A. On the character of the vessels.

International law is largely to be collected from the practice of different nations and the authority of writers, as was held by Lord Mansfield in a case in which ambassadorial privileges were concerned, cited in *Queen* v. *Keyn* (2 Exch. Div., 63, 68, 70). In this inquiry we are engaged in investigating the practice of nations, and are scrutinizing the authority of writers. These are the very points at issue.

Froissart's Chronicles, referring to very early times, says that in the English and French wars fishers were not evil entreated by either party, but were treated by both as friends, because they aided each in need. It may be said again that the early exemption was applied to the rude, small, open boats of that time, fishing near their respective coasts; was granted originally as an express exemption by royal grace on each occasion, and came within that part of the broad rule of humanity which concedes certain privileges to people who work with their hands in respect to the tools of their trade or occupation. So the British King's proclamation of October 5, 1406, established and decreed that under the royal protection, safe conduct, charge, and care the fishermen of France, Flanders, and Brittany may "freely and lawfully sail about and travel back and forth, and may fish * * * through and within our domain, limits, and territory." But this does not refer to any state of war

at that particular time, and must be construed in reference to the English claim throughout that age of sovereign title to France.

The *Young Jacob* case, *supra*, shows that it was merely not "usual to make captures of those *small fishing vessels*;" that the rule of exemption was a rule of comity only and not of legal decision, and had prevailed from rules of mutual accommodation between neighboring countries, and from tenderness towards a poor and industrious people. Now, we contend that the rule referred to very small vessels, open boats, fishing close along the coasts; that the exemption proceeded from an express allowance of royal grace; that, while on the Continent, and especially in France, this exemption so derived grew into a tolerably well-fixed rule, even in France the danger of imposition appeared and weakened the rule, because larger boats conveying intelligence to the enemy sought to pass under it, as is shown in the case cited in the note to the *Young Jacob* report, 1 Rob., p. 21; that in England the rule never passed beyond the discretion of the executive, and was always allowed specifically. In 1806 an exemption was allowed by England to "fishing vessels * * * engaged for the purpose of catching fish and conveying them fresh to market;" but it would seem to have been open to the same objection as that shown in the *Young Jacob* to attach to the exemptions granted by France, namely, that it was made use of to aid the enemy; for it is to be particularly observed that it does not seem to have been allowed since in England. There is no grant of any such exemption in the Crimean war. Therefore, in considering the subject, especially as viewed by

the appellants' brief, it must be remembered that the writers on international law—and especially the Continental writers on international law—are far in advance of legislation, as well as of decisions of the courts; that while the English law writers are more sober in their statements, and have greater regard for the rights of belligerents, even they do not express the English law as it is, but rather as they conceive it ought to be; and that in looking to any foreign rule for our guidance we properly regard, where our own practice and law are silent on the question, the decisions of the English courts, and not the speculations of writers on international law, either English or Continental.

The work of De Boeck, "De la Propriété Privée Ennemie sous Pavillon Ennemi," Paris, 1882, contains on pages 217–224, inclusive, a full statement of the history, learning, and authorities on the exemption of fishing vessels. It is there shown that the exemption is an ancient usage, applying to enemy boats engaged in coast fishing. The motive of a humane concession to poor people is noted, and among notes which cite the authorities the immunity is said to extend to the persons, boats, provisions, nets, and other apparatus and to the cargo of fish. The French origin of the exemption is referred to, and it is shown, as we contend, that at the beginning, under the old ordinances, there was an express direction to the admiral to grant the exemption; and it is noted that later, under Louis XIV, the enemy's fishing boats were not respected because of the alleged breach of faith on the part of the English in seizing French fishing boats, which obliged

the French King to disregard the treaties, which otherwise would have been disadvantageous to the French. It is also shown that the French ordinance of October 1, 1692, was regarded as merely a safe-conduct to enemy fishing vessels for eight days. The right is spoken of as a "French tradition," which was interrupted for more than a century and was reestablished by Louis XVI in the war for American independence, and extended to all such vessels as were not defensively armed and had not been convicted of giving signals or intelligence to enemy vessels of war, this renewal of the exemption being continued through the wars of the French revolution, "but not without some intermittence," the facts of which are given. The affirmance of the rule in the Crimean war by France, in the Italian war, and the Franco-Prussian war, are also stated, as well as the fact that the United States followed the practice in the Mexican war, Ortolan and Calvo being cited as authorities for this statement, although no formal record of an exemption can be found in our public record of the Mexican war. The fact is expressly stated that the British cruisers in the Crimean war seized the boats, nets, fishing implements, and provisions of the offshore fishers in the Sea of Azof. De Boeck then asks the question: "But is there in this custom of exemption so much of fixity and generality as to erect it into a positive rule and formula of international law?" He says that Heffter, Bluntschli, Calvo, and Massé admit the positive rule without hesitation; Bluntschli, however, stating that only those fishers are exempted who are ob-

viously in condition for the exercise of their calling, and attention is called to the fact that Mr. Hall has noted the danger which exists that fishing boats and their equipment may be employed for the benefit of the enemy's military operations. It appears to be conceded that while there is such a custom which does or ought to consecrate the immunity, there is no imperative character about it, and the passage concludes with the exception that while the coast fisheries should be protected, the immunity should not be extended in favor of deep-sea fishing, the reason for the immunity ceasing in that case as in the case of fishing boats employed in the enemy ervice.

Mr. Hall's passage on this subject (W. E. Hall, Treatise on International Law, 4th ed.) shows well the much more cautious views of the English writers, as well as of English decisions. He considers the subject on pages 467–470, and says that "the doctrine of the immunity of fishing boats is mainly founded upon the practice with respect to them with which France has become identified, *but which she has by no means invariably observed.*" On the other hand, "the English Government in 1800 distinctly stated that in this view the liberty of fishing was a relaxation of strict right made in the interests of humanity and revocable at any moment for sufficient reasons of war," the attitude of the French Government being less clear, Napoleon's complaints of the English seizures being valueless as an expression of a settled French policy, and his statements being "utterances of generous sentiment with which he was not unaccustomed to clothe bad faith."

> In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself. * * * But it must at the same time be recognized that fishing boats are sometimes of great military use. * * * Any immunity which is extended * * * must be subject to the condition that [the objects thereof] shall not be suddenly converted into noxious objects at the convenience of the belligerent; and it is not probable that states can consent to forego the advantages which they may derive from the use of their fishing vessels in contingencies which can not always be foreseen. It has never been contended, except by the French at the beginning of the present century, that vessels engaged in deep-sea fishing are exempt from capture (id., pp. 468, 469).

The degree to which the doctrine is settled in the view of the continental writers is briefly referred to by Mr. Hall in note 2, page 469.

Reference has been made in the brief to the fact that the writers on international law, and especially the continental writers, are far in advance of the law as determined by legislation or decisions, or by the plain consensus of agreement on the part of the nations, and that they indulge in speculations which are not justified. We are contending that the court will regard principles fairly settled, but will not be influenced by hypothetical views or considerations of what the law ought to be or may be in the future rather than what it is. The more

sober view of the English writers is well illustrated by the following passages from the preface to Mr. Hall's book (pp. viii–ix):

> But looking to the future, it must be granted that some doubt as to the strength of international law is not wholly unreasonable. Two different sets of indications point in opposite directions. In no previous period have endeavors been made, such as those which have been made during the present generation by the greater European States, to conclude agreements which should not merely express the momentary convenience * * * of the contracting powers, but should embody principles capable of wider and of impartial application. * * * But agreements suggesting rules of action, such as that with respect to occupation on the African coast, and agreements prescribing general rules of conduct, such as the Convention of Geneva, are almost wholly new. * * * They [professors of international law and writers thereon] have done a good deal towards rendering doctrine harmonious and consistent. * * * On the other hand, it is not to be denied that there is a widespread distrust of the reality of this progress. Many soldiers and sailors, many men concerned with affairs, have little belief that much of what has been added in late years to international law will bear any serious strain. And, however convenient a standard of reference that law may be to the settlement of minor disputes; however willing statesmen may be to defer to it when they are anxious not to quarrel, grave doubt is felt whether even old and established dictates will be obeyed when the highest interests of nations are in play. This feeling, for reasons which can not be dismissed as unfounded, is probably

stronger in England than elsewhere; but it is not confined to England.

In addition it is to be noted that the quotation or citation in the brief on behalf of the captors, filed in this cause, refers to a passage from a recent article by Mr. Theodore S. Woolsey, in which the authority of the speculative continental writers on international law is strikingly denied.

In the opinion of the case of *La Nostra Segnora de la Piedad y Animas*, captured in 1801 by a French privateer and ordered to be restored, reported as cited on the appellants' brief, page 14, and also in Pistoye et Duverdy I, 331, it is conceded that by the primitive international law the vessel would have been subject to the right of maritime capture, but was freed from it by a sort of tacit convention between all the European nations. The conclusion of the court restoring the vessel was based upon a royal ordinance of Louis XIV, where the absolute neutrality of the fisheries was recognized. Now, it appears by that very ordinance that English fishermen were forbidden the shores of France, although those who were there were accorded safe conduct for eight days to return home. The opinion goes on to show that France subsequently did not deviate from those principles, and in 1779 the King again expressed the definite royal grace, moved by the class of his own subjects who had for their subsistence only the resources of the fishing trade and as an example to his enemies of his sentiments of humanity; and thereupon gave an express order not to molest English fishermen or arrest their vessels with their cargoes of fresh

fish even if the fish had not been caught from those vessels, provided they were not offensively armed and had not given any suspicious signals to enemy's vessels of war. Here was an express grant of exemption as late as the end of the last century, and the restoration in the case above cited was based upon it. The opinion shows that the French were scrupulous to set an example to the British because "the British ministry brusquely and under vain pretext broke the convention relative to the reciprocal neutrality of fishermen, and sacrificed some unfortunate families to the alarm which the maritime confederation of the north caused."

The decision extended to the Portuguese vessel as a signal favor the same exemption which they had granted toward the English, of whom the Portuguese were allies. It appears, too, that the Portuguese vessel went out solely for fishing, and was occupied solely in this work all the time she was at sea and did not leave Portuguese waters; that she had sailed from a Portuguese port, and was taken only 3 leagues out at sea, opposite another Portuguese port.

The appellants cite various modern writers on international law or "European international law," to which generally we have adverted *supra*. The proper basis of the exemption is shown in the phrase "vessels and implements of coast fishermen" (brief, p. 23), and the fullest extent even of the continental rule is shown in the following statement from Perel's International Public Law of the Sea, 1882, p. 216: "The exemption of the fishing trade from the law of prize in modern positive

international law *may be considered* as well established *through well-founded custom.*"

In 1870 again there was an express order from the Emperor of the French to his officers to permit coast fishing even on the enemy's shores, unless they involve some "abuse which may prejudice military and maritime operations." (Appellants' brief, p. 29.)

The sections quoted from Calvo's International Law (brief, pp. 30–32) show that England never went so far as France in regarding the exemption of fishing vessels as a fixed and acknowledged rule, and, in revoking the ordinance by which they were seized, declared that as to herself "the freedom of the fisheries was an act of pure toleration, which could not be applied to the 'great fisheries' nor to the oyster trade." And even Calvo states that the privilege of exemption is only to fishing boats plying their industry in proximity to shore and is in no country extended to vessels who pursue on the high seas what is called the great fishery, such as that for the cod, cachalot, or the whale. "These vessels are, in effect, considered as engaged in both commercial and industrial operations."

The fact as to exemption by our own Government during the Mexican war appears to be stated in the law writers, but as we have said does not appear of record, and in this country there does not seem to have been any express exemption or any instructions from which such an exemption may rightly be inferred.

Finally, we point out the distinction again between vessels properly exempt as fishing vessels, even if the

United States may rightly be regarded as acquiescing in the foreign continental rule and those which are not so exempt. Vessels exempt are the small and rude open boats of fishers plying their trade near the coast; they are not the decked and sloop or schooner rigged vessels which we have here. It is the understanding of the Government, also, that while these vessels, perhaps all of them, were so constructed that sea water should circulate through them freely, in which the fish were kept alive, they were all plainly capable of carrying freight, and that when not engaged in fishing they did a coasting business. This is shown in the case of the *Paquete Habana*, although not by the testimony in the other cases. The vessels here proceeded in one case about two hundred miles to the neighborhood of Cape Antonio, and were off the Cuban coast, how far it does not appear. The other vessel had been across the high seas to fishing banks off Yucatan, eight days distant. All these vessels were manned by crews of from six to eight men, with a master. They were not owned by the master and others who navigated them; they were not like the tools of trade upon the principle as to which the small fishing vessels under the old rule were largely exempted. The interest of the crew in these vessels and their cargoes was confined to two-thirds of the cargo of fresh fish. The vessels and the rest of the cargoes were owned by claimants, presumably very well to do, who may have owned several fishing boats or a fleet of them; they may very well have been, allowing for the different conditions in Cuba, of the capitalist class. The vessels were, as appears by the record, vessels engaged in the Spanish-Cuban coasting trade and

merely possessing a license to fish, and inasmuch as there is no evidence showing that the owners were of the Cuban rather than of the Spanish party, no good reason can be given on any other ground than the character of the vessels for their exemption. Indeed, the residence of the claimants in or near Havana, the very center or headquarters of the Spanish Government, shows the contrary very clearly. They were apparently willing subjects and cordial adherents.

These vessels are just such vessels as yearly proceed from Gloucester, Mass., Halifax, Nova Scotia, and the Brittany coast of France to the Newfoundland fishing banks, where they remain for months engaged in deep-sea fishing. This is common knowledge and does not require a citation of recent fiction to show the character of the vessels, the size of the crews, and the nature of the fisheries and of the perils undergone. Will it be contended that these fishing vessels would not be valid prize, and that they could safely remain on the grand banks in case of war between their respective countries?

B. As to the character of the ownership and the status of the Cuban people.

The cases cited by the appellants (pp. 38–40) show one thing very clearly—that the recognition of the belligerency or independence of a people is a political and not a judicial question. Chief Justice Marshall, in the *Divina Pastora Case* (4 Wheat., 52), announces the underlying principle, viz, "that the Government of the United States, having recognized the existence of a civil war

between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes and which new governments in South America may direct against their enemy;" and the decision was that, the United States having recognized belligerency, captures by cruisers of the belligerent governments were to be regarded as other captures *jure belli* are to be regarded, and the captured property could not be adjudicated in our courts, but must be restored to the possession of the captors. Thus the recognition of the belligerency on the one hand, which was definitely shown, and the remaining neutral on the other, were necessary parts of those decisions. No question as to the status of individual belligerents as to us arose, and necessarily could not arise as it arises here, because (1) we carefully avoided recognizing Cuban belligerency and finally recognized, by a somewhat ambiguous clause of the resolution of Congress, the *propriety* of their independence; (2) we did not remain neutral, but immediately embarked in a war with Spain; (3) these facts surely give us no right to determine the allegiance of subjects of Spain in Cuba, many of whom certainly desired to retain their allegiance to the Spanish Crown; (4) to illustrate this it may be added that a nation may assert its own independence, as we did in 1776, and then fight for the assertion and win on the issue of war presented; or a nation may assert the independence of another nation which is oppressed, as in the case of Cuba, and fight as we did against Spain, and thereby achieve the independence of that portion of

the previous subjects of the enemy *who desired to be independent*. But the nation who thus champions the cause of the oppressed can not compel the assent of those who do not think they are oppressed, nor violently change their relation and status in international law, under such circumstances as are presented here, from the character of an enemy subject into that of a belligerent ally. That is to say, we contend that the status of the Cuban people is a political question not committed to the decision of the courts as shown by the judgments of the Supreme Court of the United States; and that the political question was determined by the resolution of Congress in the light of what preceded that resolution in no such way and sense that subjects of Spain were turned into friends of the United States who are entitled to have their property seized as prize restored to them because of the language of the resolution.

To bring this out, let us consider for a moment the case of the *Three Friends* (166 U. S., 1, 56), in which the court was considering the language of the neutrality acts, and held that "if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term [a State], then the words 'colony, district, or people,' instead of being limited to a political community, which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country in the effort to achieve independence, although recognition of belligerency has not been accorded." The decision

turned on the point that although belligerency had not been recognized in the Cuban case, the struggling insurgents were nevertheless embraced by the word "people."

This shows again the different application of all these principles to the peculiar facts of this case. The belligerency of the Cubans was never recognized unless by the resolution of April 20; that resolution did recognize their independence by stating that the Cubans were and ought to be free and independent, a somewhat inconsistent statement as applied to another people who might not be willing to fight for their independence as a people, in contrast with our own willingness to fight for our own independence under the similar language of the Declaration of Independence; did such a recognition of independence under these circumstances make the Cuban people a State? There is not yet a Cuban State in the list of nations, and we are still necessarily carrying on the government of that island by a military administration.

The argument against the claimants' position as to the status of the Cuban people may also be presented in another twofold aspect: First, the resolution of Congress only dealt with the *political* rights of the people, and did not attempt at all to legislate with respect to their private rights and private property, or to settle any such rights as those of prize, either against them or in their favor; second, the question raised is a *political* question and not a judicial question, and therefore the only relief claimants could have, if they have any at all, would have been by application to the executive branch of the Government by a petition. In support of the latter contention we cite especially the decision of the English high

court of chancery in the case of *Barclay* v. *Russell* (3 Ves., Jr., 424), which, it appears to us, completely disposes of the question. This decision is one of peculiar authority in this country, from the fact that the Supreme Court of the United States, in the case of *Rhode Island* v. *Massachusetts* (12 Pet., 657), cites it with approval and uses it as an illustration of the difference between a political question and a judicial question with respect to cases of *reprisal* and *confiscation*. The following quotation is taken from the report of that case (p. 738):

> It has never been contended that prize courts of admiralty jurisdiction, or questions before them, are not strictly judicial; they decide on the questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted, *a fortiori*, if such courts were constituted by a solemn treaty between the State under whose authority the capture was made, and the State whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property. (6 Cr., 284, 285.)
>
> These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or State exerts by his or its own authority, as *reprisal* and *confiscation* (3 Ves., 429); the latter is that which is granted to a court or judicial tribunal. So of controversies between States; they are in their nature political, when the sovereign or State reserves to itself the right of deciding on it; makes it the "subject of a treaty, to be settled as between States independent," or "the foundation of representations from State to State." This is political equity, to be adjudged by

> the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them. These are the definitions of law as made in the great Maryland case of *Barclay* v. *Russell* (3 Ves., 535), as they have long been settled and established. Their correctness will be tested by a reference to the question of original boundary, as it ever has been and yet is by the constitution of England, which was ours before the Revolution, while colonies (8 Wheat., 588), as it was here from 1771 to 1781, thence to 1788 and since by the Constitution as expounded by this court.

Whatever might have been the case as to the right of Cuban vessels, flying a Cuban maritime flag and operating against Spanish vessels, to make prizes under the decision in the case of the *Ambrose Light* (25 Fed. Rep., 408), as matter of fact there were no such Cuban vessels. The appellants refer to the fact that these vessels necessarily bore the Spanish flag (brief, p. 50); that no Cuban maritime flag then existed, nor has a Cuban flag actually been recognized by our Government up to the present; that Cuban vessels now use the American flag. These facts are true. From this the appellants draw the conclusion, referring to the case of *La Palme* (Wheat. Int. Law, 2d Eng. ed., sec. 340a, reported in Recueil General des Lois et des Arrets.— Sirey, De Villeneuve, et Carette, 1873, II, 237), that all the fishing smacks should be restored. The distinction is an obvious one. In the *Palme* case, a German-built vessel, belonging to a Swiss corporation, but flying the German flag, was seized as prize during the Franco-Prussian war by a French

cruiser. It appeared that Switzerland, not being a maritime nation, had no maritime flag, and that the Swiss federal council did not permit vessels belonging to Swiss subjects to fly the federal flag, and that France had, in 1854, refused to acknowledge any Swiss maritime flag. Therefore the German flag was borne, and the decision very properly restored the vessel under these circumstances. Switzerland, however, was a nation and a neutral nation. There was no Cuban nation in this case, and these Cubans were Spanish subjects, and, as we claim, are fairly to be regarded as cordial and willing Spanish subjects. Spain has had and has a maritime flag, and these vessels bore it. The *Palme* Case has no applicability to the present one. The report in that case shows the following very special reasons why the vessel was ordered to be restored, viz:

> Because of the exceptional circumstances, and in consideration of the services rendered by Switzerland to a French army during the war, it is proper to yield, in the case of the Society of Protestant Missions of Bâle, the right which belongs to the French Government of declaring to be good prize every vessel sailing under the enemy's flag: Art. I. The decision appealed from is reversed. Art. II. The security (or bond) that has been given is ordered discharged, and the sums which may have been deposited thereunder will be restored.

The entire reasoning of the appellants is based upon the fact that these are "neutral ships," setting out before the war and without any opportunity on the part of the owners to take them back under their own flag, or, in this case, by any other ways to declare and vindicate their

neutrality. But we repeat our contention that these vessels were not neutral ships; they were enemy ships.

In the course of argument, though not in this case, counsel for claimants of one of the vessels referred to Lord Byron's cynical and scornful view of prize money, which is associated with revenge, as a proscribed and contemptible thing. Lord Byron, particularly when he wrote those lines early in his life, is not a fortunate authority on a question where either a high or low motive for a human action might be assumed. By instinct he chose the lower one, because he was by nature a scoffer. There have been times, and in periods comparatively modern, when the reproach of selfish and unworthy motive might be imposed upon privateers. Certainly no one can fairly imagine that the record of this war shows the naval officers of the United States to have been acting under any other motive than a high sense of their duty and a strict sense of their honor. In the motives for action and in the slender worldly rewards for the service rendered both in the military and naval branch of the Government, thoughtful men have long seen a public service which was more completely altruistic and less tainted by lower and personal motives than almost any other work in which men embark. However devoid of self-sacrifice war in its objects may be, it is the nation and not the individual which declines to recognize the higher motive, because of the necessity of national self-preservation; the individual fully recognizes the motive of self-sacrifice, and the result as to him vindicates the motive. Therefore the imputation upon the reasons

for these seizures is highly unjust to the Navy. The record of releases by Executive action, and often because of the Navy view of the circumstances, is not before the court. The Government is fully convinced that the cases which have now been heard on appeal are cases of good and valid prize, and the officers of the Navy, if they had not brought the vessels in for adjudication, would clearly have been derelict to their duty.

Something has also been said as to the abolition of prize money and the repeal of the statutes allowing it by the act of March 3, 1899 (30 Stat., 1007). This only refers to the allowance to the officers and men of the Navy. Prize is a sovereign right of the United States, which, like this and other *jura coronæ* in England, still remains and will continue to be asserted in case of future wars, until the historical attitude and uniform desire of the United States that private property of the enemy on sea as well as on land should be exempt from capture has been incorporated into the law of nations by international agreement.

The United States therefore respectfully submits that the decree of condemnation of these vessels and their cargoes in the court below should be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PASOS, CLAIMANT, APPELLANT, v. THE UNITED STATES. — No. 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT, CLAIMANT, APPELLANT, v. THE UNITED STATES. — No. 396.

THE FISHING SMACK CASES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION.

This question was raised by the court on the oral argument, and leave granted to file briefs. The question had

escaped the attention of counsel, apparently on both sides, in the court below as well as here. It arises as follows:

Section 695 of the Revised Statutes provides:

> An appeal shall be allowed to the Supreme Court from all final decrees of any district court in prize causes where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed without reference to the matter in dispute on the certificate of the district judge that the adjudication involves a question of general importance; and the Supreme Court shall receive, hear, and determine such appeals, and shall always be open for the entry thereof.

Although it has been determined that prize jurisdiction is involved in the general delegation of admiralty and maritime powers as expressed in the language of the ninth section of the judiciary act (1 Stat., 76), and although admiralty and maritime causes, where the matter in dispute, exclusive of costs, exceeded the sum or value of $300, might, under the judiciary act, be removed by appeal from the district courts to the circuit courts, and then could be transferred from the circuit courts to the Supreme Court by a writ of error (secs. 21, 22, judiciary act; 1 Stat., pp. 83, 84), nevertheless, subsequently provision was made for appeals from the circuit courts to the Supreme Court in cases of prize or no prize, among others where the matter in dispute, exclusive of costs, exceeds the value of $2,000. (Act of March 3, 1803, sec. 2; 2 Stat., p. 244; *The Admiral*, 3 Wall., 603, 612.) See also section 692, Revised Statutes, as to which it will be noted that the phrase "and of prize or no prize,"

appearing in the original act of 1803, has been omitted, doubtless because of the subsequent express provision that prize appeals shall go direct from the district courts to the Supreme Court. And by the act of June 30, 1864, section 13 (13 Stat., 310), such direct appeal was given with the same limitation appearing in the equivalent section of the Revised Statutes (sec. 695), the language of the act of 1864 being: "Such appeals may be claimed whenever the amount in controversy exceeds two thousand dollars, and in other cases on the certificate of the district judge that the adjudication involves a question of general importance." Section 13 of the act of 1864 also provides as to any prize causes then pending in the circuit courts that they "shall, on the application of all parties in interest who have appeared in the cause, be transferred by that court to the Supreme Court, and such transfer may be made in the discretion of the court and on such terms as it may direct, on the application of any party; provided, that if the amount in controversy does not exceed two thousand dollars such transfer shall not be made unless the court shall certify that the adjudication involves a question of general importance."

This provision has, of course, disappeared from the Revised Statutes, because the appeal from the court of first instance is now direct to the Supreme Court. *The Alicia* (7 Wall., 571) considers the subject relative to a case then remaining in the circuit court.

The case of *The Admiral* (3 Wall., 603, 612) was appealed from the district court to the circuit court while the provision reducing the minimum value required for such appeals to the sum of $50, exclusive of costs, was

as applicable to prize causes as it then still was to all the other matters of jurisdiction embraced by the second section of the act of March 3, 1803. Reference is made to the case cited, and the authorities therein referred to for further light on the subject.

It seems that a decree of condemnation or of restitution in the court below is a final decree, because nothing is left to be litigated between the parties, even if all matters arising upon the libel and all the claims have not been finally disposed of (*Withenbury* v. *United States*, 5 Wall., 819). For instance, the question of distribution in case of condemnation always remains, but does not affect the finality of the decree below. (See section 4637, Revised Statutes.) Section 1009, Revised Statutes, provides that the Supreme Court may, "if in its judgment the purposes of justice require it, allow any appeal in a prize cause;" but this obviously refers to cases where appeals have not been perfected within the time limit of thirty days after the rendering of the decree appealed from, but where notice of appeal or of intention to appeal has been filed with the clerk of the district court within that period.

Upon the foregoing it is evident that an appeal to this court where the sum or value of the property does not amount to $2,000 is not well taken, unless the district judge certifies that the adjudication involves a question of general importance. There is no such certificate in these cases.

Is the question, however, affected by the provisions of the circuit court of appeals act? That act (1 Supp. Rev. Stat., 903) provides by section 5, "that appeals or writs of

error may be taken from the district court or from the existing circuit courts direct to the Supreme Court in the following cases: * * * from the final sentences and decrees in prize causes." * * *

The circuit court of appeals act does not therefore seem to affect the question of limitation, unless it should be considered that the following paragraph of section 5, being the one next to the last, is involved:

> In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.

But we think it is obvious from all the provisions of section 5 that the reference to finality only embraces those cases which are not made final in the *circuit court of appeals*, and does not refer to cases not final in the district or circuit courts under earlier creations of jurisdiction, including prize causes. We are unable to find any authority to show that the effect of a restatement of jurisdiction by the circuit court of appeals act, such as that in reference to prize causes, containing no express repeal of any preexistent limitation of jurisdictional amount, operates to work a repeal by implication. This is contrary to a well-established rule, and we therefore respectfully submit that an appeal in a prize cause not conforming to the limitation and condition shown by section 695 is not well taken.

Under the peculiar circumstances of these cases it seems proper to submit the question to the court without further argument.

Reference was also made in the oral argument to the fact that the circumstances justified the belief that the claimants in these cases were well to do and presented no humanitarian claim to exemption which ordinary fisher folk, working as well as owning their boats, would present; and it was stated that the two records before the court did not disclose whether claimants in any one case were interested also in other cases. It is, however, the fact, and is shown by the records in the other cases below, that Francisco Gonzales—the owner in the *Lola* Case is named Gonzales, but not Francisco (Rec., pp. 12, 13)—is part owner of the *Poder de Dios*, and also of the *Engracias;* and that Villar & Co. are sole owners of the *Antonio Suarez* and part owners of the *Antonio y Paco.* We do not contend that well-to-do people, the owners of fishing vessels, who were active Cuban sympathizers would not be entitled to an exemption, otherwise properly founded, without reference to the amount of their possessions; but we do say that this circumstance and the facts that they were residents at Havana, the seat of the Spanish Government, and that their vessels were bringing supplies to that place, have, in their combined effect, an important bearing on the question, as showing that they clearly belonged to the dominant Spanish population and not to the insurgent party. This, we say, fairly affects the question of further proof. The temptation to say now that they were at all times sympathizers with and aiders of the insurgent cause, and that they were awaiting an opportunity to leave the hostile territory and remove their property therefrom on the first opportu-

nity, is a natural and obvious temptation. We therefore respectfully submit that further proof is not properly allowable in this case.

Finally, a word may be directed to the hypothetical cases suggested by the court on the oral argument.

A French cruiser in our war of independence, after France appeared as our active ally, could not have made valid prize of an American merchant vessel or fishing vessel flying the American flag. Probably a French cruiser would not have made such a seizure, nor would the French prize courts have sustained it if made, although their prize decisions later, during the Napoleonic wars, appeared to ignore their previous relations and their existing obligations to us. But there was an American flag throughout our war of independence. France had fully recognized our belligerency and independence, and the two nations were acting as cordial allies on land and sea. In the present case there was a Cuban flag, which had long been the badge of the insurgent cause, and was not used on the water only because of the weakness of the Cuban party; it might have been so used, but the claimants here did not carry it on their vessels. The risks were obvious, and assuming (which is not admitted) that they were favorable to the Cuban side, they did not choose to incur the risks.

Again, in the other case suggested of an American vessel in our war of independence flying the British flag and seized by a French cruiser, we submit that such a vessel would have been good prize, and would promptly have been condemned in the French courts, because it

would appear that there was no true American claim—that the claimants were of the American Tory party and were British adherents. That is just this case—all the indicia and analogies show that the claimants were not Cubans, nor their vessels Cuban vessels, but that they were Spaniards and their vessels enemy vessels.

Respectfully submitted.

HENRY M. HOYT,
Assistant Attorney-General.

No. 395 and 396
Ad. Bf. of Atty. Genl.

Filed Nov. 11, 1899.

In the Supreme Court of the United States.

October Term, 1899.

The Spanish smack "Paquete Habana," Juan Pasos, claimant, appellant, *v.* The United States.	No. 395.
The Spanish schooner "Lola," Tomas Betancourt, claimant, appellant, *v.* The United States.	No. 396.

FISHING SMACK CASES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT ON BEHALF OF THE UNITED STATES RELATIVE TO EXEMPTION ALLOWED TO FISHING VESSELS IN THE MEXICAN WAR.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK "PAQUETE HABANA," JUAN PASOS, claimant, appellant,
v.
THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER "LOLA," TOMAS BETANCOURT, claimant, appellant,
v.
THE UNITED STATES. } No. 396.

FISHING SMACK CASES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT ON BEHALF OF THE UNITED STATES RELATIVE TO EXEMPTION ALLOWED TO FISHING VESSELS IN THE MEXICAN WAR.

It is respectfully submitted to the court that no reference can be found in American writers to this fact. In treating of the subject they do not mention the Mexican war. (See Woolsey's Introduction to the Study of Inter-

national Law, second edition, pages 282–3; Halleck's International Law, San Francisco, 1861, pages 493–4; Dana's Wheaton, eighth edition, page 431, note to section 345.) Wharton's Digest of International Law refers to the subject of exemption to fishing vessels (sec. 345) only by quoting from Halleck, pages 493–4. As to English writers, Lawrence's Principles of International Law, Boston, 1895, does not refer to the Mexican war in treating of fishing vessels (p. 383), although reference is made to exemption by express treaty stipulations with Prussia under the conventions with that power of 1785, 1799, and 1828. Hall makes the statement, but merely refers to Calvo as his authority. (Hall's Treatise on International Law, p. 468.) Calvo's statement is contained on pages 326–7. (Le Droit International, Paris, 1896, IV, § 2372.) De Boeck, in his "Propriété Privée Ennemie sous Pavillon Ennemi," also states the fact, referring to Calvo and to Ortolan (p. 222).

No existing treaties of the United States appear to contain an exemption of fishing boats. The treaties with Spain never did contain any such exemption. The "Treaty of Peace, Friendship, Limits, and Settlement" with Mexico of 1848 (Treaties and Conventions between the United States and other Powers, pp. 681, 691), 9 Stat., 922, 939, contains in the first section of the twenty-second article the following clause, which obviously refers to the future:

> Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of

> the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons.

This does not exempt fishing boats from seizure as prize, because the persons named are to be "unmolested in their persons;" or, if it should be so regarded, it would not properly include any other than the small open boats, elsewhere at times previously exempted, fishing, as Calvo says, "in proximity to the coast." And the reference is to the "armies of either nation," not to the navies nor to the "forces;" and to the persons exempted as "unarmed and inhabiting unfortified towns, villages, or places." The exemption in the treaties with Prussia, referred to by Lawrence, is precisely to the same effect.

This appeared, upon full inquiry, to be the only basis for the assertion that the United States exempted fishing boats during the Mexican war. The Bureaus of Navigation, both of the Navy and of the Treasury (in the latter of which are kept the records of vessels finally condemned as prize which subsequently obtain a United States register), are unable to find any authority for the statement, either in respect to the fact that fishing boats in the Mexican war were not seized, or if seized were released; or relative to any executive proclamation or order from the Navy Department to the respective commanders. The result of inquiry at the State Department was the same, but on examination of the records of the Mexican war as contained in the library of the Navy Department it is just

learned that in one of certain original volumes of correspondence and instructions relating to naval operations, which were, at the periods to which they relate, held to be confidential, appear the following letter and order on the subject:

U. S. SHIP CUMBERLAND,
OFF BRAZOS SANTIAGO,
May 14, 1846.

SIR:

* * * * *

Enclosed is a copy of my instructions to the commanders of vessels of the Home Squadron showing the principles to be observed in the blockade of the Mexican ports.

I am, very respectfully, etc.,

D. CONNER,
Comdg. Home Squadron.

Hon. GEO. BANCROFT,
Secretary of the Navy,
Washington.

[Enclosure.]

[Instructions to be observed by officers commanding vessels, &c.]

* * * * *

Mexican boats engaged exclusively in fishing on any part of the coast will be allowed to pursue their labours unmolested. * * *

(Signed)

D. CONNER,
Comdg. Home Squadron.

U. S. SHIP CUMBERLAND,
OFF BRAZOS SANTIAGO,
May 14, 1846.

Approved by the Department June 10, 1846.

All proclamations issued by the Executive appear in the various volumes of the statutes. Vol. 9, covering the period of the Mexican war, does not reveal any proclamation of the exemption of fishing vessels. In the report of the Secretary of the Navy for 1846 (Navy Reports, 1846–1848) appears, at pages 673, 674, the following instruction to the naval commanders, signed by Commodore Stockton: "You will capture all vessels under the Mexican flag that you may be able to take."

The only record on the subject in the Spanish war in the Navy Department, either published or unpublished, is that shown on page 178 of the appendix to the Report of the Chief of the Bureau of Navigation for 1898, in the telegram from Rear-Admiral Sampson to the Secretary of the Navy, dated off Havana, April 28, 1898, and that from the Secretary of the Navy in reply, dated Washington, April 30.

The English rule (which is an instructive guide to American practice) plainly is that such an exemption is at all times in the control of the Executive, and the Executive did not grant it in the Spanish war.

HENRY M. HOYT,
Assistant Attorney-General.

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